IN THE HIGH COURT OF DELHI

CRL.M.C.No.550/2005

Gajraj Jain ..... Petitioner
! through: Mr. S.N.Mehrotra, Advocate

VERSUS

$ State & Anr. ..... Respondents
^ through: Mr. Mohit Mathur and
Mr. S.S.Chadha, Advocates

RESERVED ON: 23.10.2007

% DATE OF DECISION: 29.10.2007

CORAM:

* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y

2. To be referred to the Reporter or not? Y

3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**

1. Gajraj Jain is aggrieved by the order dated 13.7.2004 passed by the learned Metropolitan Magistrate summoning him to face trial as an accused for the offence under Section 420 read with Section 34 of the Indian Penal Code in a complaint filed by Sh. K.K.Gupta as karta of K.K.Gupta & Sons (HUF).

2. The complainant alleged that for the reasons stated in the complaint offence under Section 406, 409 and 420 of the Indian Penal Code were made out. However, as noted above, learned Metropolitan Magistrate has summoned the accused persons to face trial only in respect of the offence under Section

420 IPC.

3. In his complaint, K.K.Gupta has stated that Hilton Rubbers Ltd. was a Private Ltd. Company and had invited deposits from public for a period of one year. That as karta of the HUF he had submitted the necessary application for making the deposit enclosing therewith Cheque No. 299424 dated 24.12.1997 in sum of Rs.7,50,000/-. The company encash the cheque and accepted his application on 31.12.1997 with retrospective date i.e. 27.12.1997. That due date of maturity was 27.12.1998. The amount was refundable on maturity in sum of Rs.8,70,750/-. When date of maturity was approaching, he submitted the original receipt for encashment of the deposit with accumulated interest. Amount was not released in his favour. That Gajraj Jain, a director of the company assured him that the money would be paid shortly.

4. It was further stated in the complaint that as no amount was paid he caused to be served upon the company a notice of demand dated 9.7.1999. No amount being released he was compelled to approach the State Consumer Dispute Redressal Commission under the Consumer Protection Act for payment of the amount due. That during pendency of the said complaint he received an assurance that the amount would be refunded in installments and in respect thereof, Kulbhushan, an Executive Director of the Company issued to him a letter dated 7.7.2000 informing that if he unconditionally withdrew the complaint before

the State Consumer Dispute Redressal Commission the company would refund the amount to him with interest but in installments of Rs.25,000/- per month. Accordingly, he withdrew the complaint filed by him before the State Consumer Dispute Redressal Commission, but no amount was paid to him.

5. It was further alleged that the company made a reference to BIFR under the Sick Industrial Companies Act 1985 for being declared a sick company and sought restructuring. That he moved an application before BIFR for refund of the deposit made but was informed by BIFR vide order dated 8.7.2003 that he was free to take resort to action available as per law and that no directions were being issued by BIFR in respect of the deposit. That BIFR has since recommended winding up of the company.

6. It was further stated in the complaint that the directors of the company painted a rosy position of the company viz-a-viz its management and profit in order to attract depositors to invest in the company knowingly well that the company had no means to repay the depositors on maturity of the deposits. Thus, it was alleged that the directors of the company namely the petitioner Gajraj Jain, one Mr. Sanjay S.Kilachand and Sh. C.B.Sharma had with dishonest intention cheated the complainant.

7. Before analyzing the respective submission of learned counsel for the parties an agreed fact may be noted. The complainant has admittedly approached the Company Law Board under the Companies Act 1956 for recovery of the money due to

the HUF as an unsecured creditor.

8. Learned counsel for the petitioner submitted that the petitioner had resigned from the Board of Directors on 29.11.2000. That K.K.Gupta was admittedly the Vice President of the Company when the deposit was made in December 1997 thus as a Senior Executive of the Company he was fully aware of the financial future of the company. That sine qua non for the offence of cheating is an intention to deceive at the very inception. Inability to pay due to commercial insolvency or hardship does not made out an offence of cheating. That it is a general tendency to invoke the jurisdiction of criminal courts even in respect of the purely commercial and civil transactions. That the complainant was fully aware of the fact that his remedies were before civil forums inasmuch as he preferred a complaint before the State Consumer Redressal Dispute Commission under the Consumer Protection Act followed by an applicant before the Company Law Board under the Companies Act 1956. The complaint in question was filed on 24.11.2003 relatable to a cause which had accured on 27.12.1998.

9. Responding to the submissions made by learned counsel for the petitioner, Sh. Mohit Mathur, learned counsel for the respondent submitted that the offence of cheating took place when on 7.7.2000 the company induced the complainant to withdraw the complaint filed before the State Consumer Dispute Redressal Commission assuring that the amount, with interest,

would be returned in monthly installments of Rs.25,000/-, but not a single cheque was tendered. On merits, counsel submitted that though complainant was the Vice President of the company but he was incharge of the plant i.e. was looking after the production aspect and therefore had no knowledge of the financial position of the company.

10. As observed by the Supreme Court in the decision reported as JT 2006 (6) SC 474 *M/s. Indian Oil Corporation Vs. NEPC Ltd.*, a given set of fact may make out: (a) purely a civil wrong; or (b) purely a criminal offence; or (c) a civil wrong as also a criminal offence.

11. A civil transaction or a contractual dispute, apart from furnishing a cause of action for seeking remedy in civil law, may also involve a criminal offence. As the nature of scope of a civil proceeding are different from a criminal proceeding, the mere fact that the complaint relates to a commercial transaction or breach of contract for which a civil remedy is available and has been availed is not by itself a ground to quash the criminal proceedings. The test is whether the allegations in the complaint disclose a criminal offence or not.

12. Since the issue involved in the instant proceedings is of the offence of cheating, it would be but necessary for this court to briefly refer to the essential ingredients of the offence of cheating. They are: (a) deception of a person either by making a false or misleading representation or by other action or omission; and (b)

fraudulently or dishonest inducement of that person to either deliver any property or to consent to the retention thereof by any person or intentionally induce a person to do or omit to do anything which he would not do or omit if he were not so deceived and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

13. Breach of a contractual term would not amount to cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction. In the decision reported as JT 2000 (3) SC 604 *Hridaya Ranjan Prasad Verma Vs. State of Bihar*, in para 9 it was observed by the Supreme Court as under:-

> "On a reading of the section it is manifest that in the definition there are set forth two separate classes of acts which the person deceived may be induced to do. In the first place he may be induced fraudulently or dishonestly to deliver any property to any person. The second class of acts set forth in the section is the doing or omitting to do anything which the person deceived would not do or omit to do if he were not so deceived. In the first class of cases the inducing must be fraudulent or dishonest. In the second class of acts, the inducing must be intentional but not fraudulent or dishonest. In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time to inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the

beginning, that is, when he made the promise cannot be presumed."

14. Tested on the anvil of the legal principles as noted hereinabove, it would be relevant to note that K.K.Gupta was the Vice President of the company when on behalf of his HUF, as Karta he made the deposit in question. He states that he was looking after the production unit. But in view of the senior managerial position which he was holding a strong presumption would arise that he was aware of the financial position of the company he was serving.

15. This fact is relevant while considering whether the complaint and the pre-summoning evidence brings out dishonest intention of the company at the very inception when deposits were invited.

16. With liberalization of the economy and breaking down of trade barriers, the commercial world has become highly volatile. With the sensex going up and down by as many as 8% to 10% on some trading days, wealth is created and dissipated in seconds. Perfectly healthy units turn sick. Units which are sick find themselves in very rosy position when governmental policies change. Take for example units engaged in exports. With the dollar falling by nearly 15% in the last one year, this court has witnessed large number of export oriented units suddenly turning sick in the last six months. But prior to the last 6 months these units were healthy units, making good profits. Thus, where a company is unable to pay its debts, to determine the intention of

the directors at the very inception, one has to look to the surrounding facts at the time when the directors acted in the name of the company of which they were directors.

17. It would be difficult to assume that the directors of the company had intention at the very inception to cheat the Vice President of the same very company. After all, K.K.Gupta was a vital functionary of the company. Of his own admission, as Vice President of the company, K.K.Gupta was incharge of the manufacturing unit. That apart, it is pleaded in the complaint that the company was unable to refund the deposit on 27.12.1998. Though not stated in the complaint but the order passed by the Board for Industrial and Financial Reconstruction to which reference has been made in the complaint, being the order by which complainant was directed to pursue his civil remedies, reveals that the said order was passed in case No. 362/1999 i.e. reference was made to BIFR for restructuring of the company somewhere in early 1999.

18. K.K.Gupta himself understood that the dispute was purely a civil dispute is evidenced from the fact that he filed proceedings before the State Consumer Dispute Redressal Commission and thereafter before the Company Law Board. For the cause, i.e. recovery of the amount due, which had accrued on 27.12.1998, the complaint in question has been filed on 24.11.2003 i.e. after 5 years.

19. The reason is obvious, though unfortunate. The

complainant has not been able to obtain favourable orders from the Company Law Board where the matter is still pending even till today.

20. As noted by the Supreme Court in the *Indian Oil Corporation's* case (supra), people are resorting to criminal jurisdiction for the reason civil proceedings are taking a little too long for decisions, thus initiation of criminal complaints is conceived of by litigants as an alternative remedy.

21. This is exactly what has happened in the instant case.

22. I accordingly hold that read meaningfully, and in light of the surrounding circumstances and especially the fact that K.K.Gupta was the Vice President of the company when the deposit was made, there is no material where from a prima facie opinion can be formed that the Board of Directors of the company had dishonest intention from the very inception when deposit in question was made.

23. As regards the plea that the complainant was induced to withdraw the complaint filed before the State Consumer Dispute Redressal Commission and but for the assurance that he would be repaid the same due, he would have continued with the complaint, suffice would it be to state that in the complaint after stating the facts the cause of action for the offence of cheating has been pleaded in paras 17, 18 and 19 as under:-

> "17. That it is evidently clear that it is thus for the attitude of the Directors that the company has gone sick. The Directors purposely painted a rosy picture of the

position of the company vis-a-vis its management and profits, in order to attract small investors depositors to invest in the company, knowing fully well that the company in future would not be able to repay the depositors on the maturity of their respective bonds.

18. It is also pertinent to note that the investment was made in the year 1997 and the bond matured in 1998 whereas the company approached the BIFR for declaring sick in 1999 only. That from the above facts it is clear that the company was in a position to pay the complainant to maturity of the bond in 1998 as the company approached BIFR in 1999. Hence the company was not sick till the maturity of the fixed deposit of the complainant.

19. That the complainant most respectfully submits that the company from the very beginning had dishonest intentions of cheating the complainant by attracting investments by way of purchase of bonds, to be made in the company but had the ulterior motive of not paying back the returns on the maturity of the bond. The company along with its directors namely Mr.Gajraj Jain, Mr.Sanjay S.Khilachand and Shri C.B.Sharma are liable collectively and individually for offences under Sections 420, 409, 406 and 34 of the Indian Penal Code."

24. The foundation of the complaint has been predicated on averments made in paras 17, 18 and 19 of the complaint as aforenoted. It is founded on the initial deposit.

25. The petition is accordingly allowed.

26. Order dated 13.7.2004 taking cognizance of the complaint and summoning petitioner to face trial for the offence of cheating is quashed.

27. No costs.

October 29, 2007 (PRADEEP NANDRAJOG)
MM JUDGE